United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by:
Francis D. Price

Docket No. 75-7555

B

P/S

IN THE

United States Court of Appeals

For the Second Circuit

THOMAS C. GANGEMI, as President of the SYRACUSE DRAFTSMEN'S ASSOCIATION,

Appellee,

— v —

GENERAL ELECTRIC COMPANY,

Appellant.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLANT,
General Electric Company

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BRIEF FOR APPELLANT, General Electric Company

STATEMENT OF THE ISSUES

1. Did the District Court err in compelling the General Electric Company to arbitrate a non-disciplinary grievance with a labor union in the face of an unambiguous agreement between the parties and sworn acknowledgments in court pleadings by the Union that neither party can be required to arbitrate a non-disciplinary grievance without the consent of the other?

2. Having concluded erroneously that the arbitration clause in the agreement between the Company and the Union was ambiguous, did the District Court err in not resolving the alleged ambiguity by resort to proffered evidence relevant to the parties' intent consisting of sworn party admissions, history of bargaining, and contract administration?

3. Did the District Court err in not determining the question of substantive arbitrability but instead deferring resolution of that question to the arbitrator?

STATEMENT OF THE CASE

A. Prior Related Action

In order to fully understand this proceeding, it is necessary to summarize a previous action involving the same parties. Gangemi v. General Electric Company, 74-CV-.92 (N.D. N.Y., 1975). (66-70) On November 15, 1974, Thomas C. Gangemi, as President of the Syracuse Draftsmen's Association (herein the "Union"), obtained an order to show cause with a temporary restraining order in New York State Supreme Court, Onondaga County, restraining the General Electric Company (herein the "Company") from laying off, displacing or changing the job assignments of certain draftsmen employed by the Company. (67) This temporary restraining order was vacated on the same day on motion of the Company. (67)

The Company subsequently removed the action to United States District Court for the Northern District of New York and on December 16, 1974, moved to dismiss the complaint upon the ground, inter alia, that the Union had failed to exhaust contractual remedies for the Company's alleged breaches of contract.* The Union cross moved for a preliminary injunction, asserting that it had no adequate remedy at law because there was no mandatory arbitration

*The Company and the Union are parties to a collective bargaining agreement effective July 30, 1973 through August 29, 1976. This agreement is reproduced in full at pages 18-51 of the Appendix.

provision in the parties' collective bargaining agreement with respect to non-disciplinary matters.

The Company concurred with the Union's assertion that the arbitration procedures of the collective bargaining agreement were not mandatory, but urged the court to dismiss the Union's cross motion on the ground that the Union had not exhausted the three-step grievance procedure, which was mandatory.

On February 4, 1975, the District Court dismissed the Union's action on the ground, inter alia, that the Union had not exhausted its remedies under the contractual grievance procedure, a condition precedent to suing for breach of contract. (1-11)

B. The Present Action

The parties returned to the grievance procedure to discuss the Company's retention of seven shorter-service draftsmen who were qualified to perform the work available. (67, 68, 74) The position of the Company was that the longer-service draftsmen whose jobs were affected by the reduction in force were not qualified to perform the job assignments of the seven shorter-service draftsmen. (65) The Union variously took the position that the Company has no right to lay-off employees at all; that the Company has no right to consider qualifications of employees, but

only their seniority, in determining who is to be laid off; and that the Company must realign its entire work force based on seniority if a lay-off does occur. The parties did not resolve the matter in the grievance procedure and the Union requested arbitration by mutual agreement. (68, 75) The Company voluntarily offered to submit to arbitration issues concerning the qualifications of identified, lower-service employees for the positions in question but received no response to the offer from the Union. (68, 76-79) The Union instead initiated the present action seeking to compel arbitration in the District Court for the Northern District of New York, asserting jurisdiction under Section 301 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. §185) and the United States Arbitration Act (9 U.S.C. §4). (12-17)

The Company cross moved to dismiss the action on the ground that the labor agreement did not provide for mandatory arbitration of the dispute but arbitration only by mutual agreement of the parties. (57-62) Specifically, the agreement provides that a grievance:

> ...involving the interpretation and application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement of the Association and the Company as executed by their authorized representatives. (Emphasis added) (23)

The Company's cross motion was supported by sworn statements by the Union in the prior action to the effect that arbitration was not mandatory, by a history of bargaining which revealed that the Union had tried unsuccessfully to secure mandatory arbitration of disputes such as this, by a history of contract administration confirming the intention of the parties that arbitration is not mandatory, and by the absence of a no-strike commitment with respect to non-disciplinary grievances. (63-73, 80-92)

On September 3, 1975, the District Court (the Honorable James T. Foley) issued its Memorandum-Decision and Order compelling arbitration.* (96-102) The Company filed a notice of appeal from the District Court's order on September 23, 1975. It subsequently moved for a stay pending appeal which the District Court denied after a hearing on October 6, 1975. The Company then applied for a stay in this Court pursuant to Federal Rule of Appellate Procedure 8. At a hearing on November 11, 1975, this Court decided to expedite the Company's appeal from the District Court order compelling arbitration so that it could determine the merits of the appeal before the Company was forced to proceed with an arbitration in which it might be legally entitled not to participate.

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*Although the Court directed the parties to arbitrate, it appeared to defer the question of substantive arbitrability to the arbitrator. See Point III, infra.

POINT I

THE DISTRICT COURT ERRED IN COMPELLING THE COMPANY TO ARBITRATE A NON-DISCIPLINARY GRIEVANCE WITH THE UNION IN THE FACE OF AN UNAMBIGUOUS AGREEMENT BETWEEN THE PARTIES AND SWORN ACKNOWLEDGMENTS IN COURT PLEADINGS BY THE UNION THAT NEITHER PARTY CAN BE REQUIRED TO ARBITRATE A NON-DISCIPLINARY GRIEVANCE WITHOUT THE CONSENT OF THE OTHER

A. A Grievance is Arbitrable Only If the Parties Have Agreed That It Should Be Resolved By Arbitration.

The United States Supreme Court stated in United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 1353, 46 LRRM 2414, 2419 (1960):

> The Congress,...has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

More recently, the United States Supreme Court reaffirmed this principle in Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 374, 85 LRRM 2049, 2051 (1974):

> No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.

The Third Circuit recently put the "national labor policy" favoring arbitrability in proper perspective as follows:

> However, even in the presence of this clear congressional policy, [favoring arbitration] it remains the rule that parties are bound to arbitrate only those disputes which, under a fair construction of their collective bargaining agreement, they have bound themselves to arbitrate....The principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties. When a contract, fairly read with these principles in mind, is susceptible of a construction that dictates arbitration, the congressional policy favoring that form of dispute resolution may require the denial of judicial relief despite the possibility of fairly reading the contract to evidence a contrary intent. But, there is no occasion to resort to this congressional policy in a case where the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute before the court. We conclude that this is such a case." Food Distributors, Inc. v. Local 229, 483 F.2d 418, 419 (3rd Cir. 1973), cert. denied 415 U.S. 916 (1974).

B. The Company and The Union Agreed Specifically To Exclude Non-Disciplinary Grievances From Mandatory Arbitration.

The parties' labor agreement contains an arbitration clause, in Article IV, which is divided into two distinct parts as follows:

> Any individual grievance involving the interpretation and application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement of the Association and the Company as executed by their authorized representatives.

> Any individual grievance involving a disciplinary penalty...may be submitted to arbitration by either party if it remains unsettled after having been properly and fully processed in accordance with the provisions of Article III. (Emphasis added) (23)

The difference between the two paragraphs is apparent. While grievances concerning disciplinary matters may be submitted to arbitration by either party once they have been processed through the grievance procedure, grievances involving the interpretation and application of a provision of the agreement may not be submitted to arbitration unless both parties agree in writing. This has been clearly understood by both parties at all times prior to the filing of the present action.

The basic objective of contract interpretation is to ascertain what the parties intended. Where each party concedes to have the same intention with respect to contract language, a court is obligated to accept this interpretation.

Papers submitted by the Union in its earlier action for injunctive relief (74-CV-492) establish that the Union has acknowledged and asserted consistently that the arbitration clause is non-mandatory with respect to non-disciplinary grievances. In an affidavit submitted to the Supreme Court, County of Onondaga, State of New York, dated November 13, 1974, Thomas C. Gangemi, the Union President, stated that:

> ...there is no binding arbitration provision contained in the parties' collective bargaining agreement with respect to this matter. (69)

Similarly, in the verified complaint filed in the prior action, the Union repeated the assertion that:

> ...there is no binding arbitration provision contained in the parties' collective bargaining agreement with respect to this matter. (69)

Additionally, in an affidavit filed in connection with the removal of the prior action to federal court, dated December 31, 1974, Petitioner, Thomas C. Gangemi, stated:

> The Deponent respectfully points out to the Court that pursuant to Article IV of the parties' collective bargaining agreement any grievance excluding a disciplinary penalty may not proceed to arbitration unless both parties mutually agree in writing. (70)

Therefore, since the parties excluded non-disciplinary grievances from mandatory arbitration in clear language and confirmed their mutual understanding of the meaning of that language in sworn statements, a court has no choice but to effectuate this express intent of the parties.

While it would appear unnecessary to consider other rules of contract interpretation where the parties have confirmed their mutual intent so unequivocably, it should be noted that to construe Article IV as mandating arbitration of all grievances renders the provision for prior mutual agreement superfluous. This is contrary to the axiom that by phrasing the separate parts of the arbitration clause differently, the parties must have intended them to have different meanings.

C. District Court Error

The District Court below failed completely in its purported "analysis of G.E.'s contentions" to consider the fact that the Union had agreed with the Company in sworn pleadings that the arbitration clause was non-mandatory. (98)

By compelling arbitration contrary to both the unambiguous language of the labor agreement and the parties' mutual interpretation of what that language meant, the District Court violated basic principles of contract and labor law. Gateway Coal Co. v. United Mineworkers of America, supra; Food Distributors, Inc. v. Local 229, supra.

The Supreme Court has recognized the right of parties to a collective bargaining agreement to exclude certain subjects from arbitration. As Justice Brennan stated in his concurring opinion in United Steelworkers of America v. American Mfg. Co.:

> "...the issue concerns the enforcement of but one promise-the promise to arbitrate in the context of an agreement dealing with a particular subject matter...Other promises contained in the collective bargaining agreement are beside the point, unless, by the very terms of the arbitration promise, they are made relevant to its interpretation. And I emphasize this for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish...." 363 U.S. 564, 570-571 (1960) (Emphasis added)

As a result of the give-and-take of the labor negotiating process, the parties in the present case framed a narrow arbitration clause and a broad exclusionary clause. The District Court erred by relying blindly on the "presumption" in favor of arbitrability and ignoring the clear expression of the parties' intent in the arbitration clause and in their sworn statements.

As this court has stated, that presumption is not irrebutable. CWA v. New York Telephone Co., 327 F.2d 94, 55 LRRM 2275, 2277 (2nd Cir. 1964). It does not relieve the district court of its obligation to analyze thoroughly contract language pertinent to the arbitrability issue and evidence bearing on the meaning of that language in order to ascertain whether the parties have agreed to submit the dispute to arbitration. A court cannot rely on the presumption of arbitrability and "avoid grappling with the contract" over that issue where, as in the present case, the arbitration clause is not couched in the sweeping, all-inclusive "standard" phraseology of the clauses discussed in the Steelworkers' Trilogy. I.U.E. v. General Electric Co., 407 F.2d 253-258, 263, 70 LRRM 2082-2085, 2089 (2nd Cir. 1968).*

*In contrast to the different treatment of arbitration in separate paragraphs for disciplinary and non-disciplinary matters in the present contract, in Warrior and Gulf the contract called for arbitration of "differences...as to the meaning and application of the provisions of this Agreement," 363 U.S. at 576; in its companion case, American Mfg. Co., the arbitration provisions covered: "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement." 363 U.S. at 565 n. 1.

The contracts in I.U.E. v. General Electric Company, supra, and in the present case are similar to the extent that both contain language suggesting a basic dichotomy between matters arbitrable as a matter of right upon demand by the Union and those subject to arbitration only by mutual agreement of the parties. In I.U.E. v. General Electric Company, supra, the Union argued that all grievances at issue were subject to compulsory arbitration. The court rejected the Union's argument because it would have rendered meaningless the extensive contractual language purporting to distinguish between permissive and mandatory subjects for arbitration. The court analyzed the pertinent contract language thoroughly and concluded that the parties had intended to exclude three of the seven grievances from arbitration.

In short, the parties in the present case exercised their right to frame a limited arbitration clause. They did so in clear language and subsequently confirmed their mutual understanding of the meaning of that language in sworn statements. The evidence was more than sufficient to enable the District Court to state with positive assurance that the parties agreed that they could not be compelled to arbitrate the present dispute. The ruling of the District Court to the contrary constituted reversible error.

POINT II

THE DISTRICT COURT ERRED IN NOT RESOLVING THE ALLEGED AMBIGUITY BY RESORT TO PROFFERED EVIDENCE RELEVANT TO THE PARTIES' INTENT CONSISTING OF SWORN PARTY ADMISSIONS, HISTORY OF BARGAINING, AND CONTRACT ADMINISTRATION

A. The History of Bargaining and Of Contract Administration Confirms the Parties' Agreement That Arbitration of Non-Disciplinary Grievances May Not Be Compelled Absent Mutual Agreement of the Parties.

1. Bargaining History

In past negotiations, the Union has proposed to modify the present contract so as to provide for mandatory arbitration of non-disciplinary grievances and then withdrawn the proposals in the give and take of the bargaining process. (70-72) The fact that these proposals were made highlights the Union's awareness of the fact that the present contract does not obligate the Company to agree to arbitrate the underlying dispute herein concerning employee qualifications.

In connection with the negotiation of the 1963 contract between the parties, the Union proposed the arbitration clause which follows and which, if adopted, would have provided for mandatory arbitration of all unsettled grievances:

> Arbitration: Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article III, shall be submitted to arbitration upon written request of either the Association or the Company, provided such request is made 60 days after the final decision of the Company has been given to the Association pursuant to Article III. (70, 83)

This Union proposal was rejected by the Company, and the clause ultimately included by the parties provided for arbitration only with prior written mutual agreement of the Association and the Company as follows:

> Arbitration: Any individual grievance involving a disciplinary penalty imposed during the term of this Agreement or involving the interpretation or application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement of the Association and the Company as executed by their authorized representatives. (70, 84-85)

In negotiations leading to the 1966-69 agreement, the parties agreed to provide for mandatory arbitration of grievances involving disciplinary penalties, but retained the option for either party to refuse to agree to arbitrate grievances involving other issues:

> Arbitration: Any individual grievance involving the interpretation and application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement of the Association and the Company and executed by their authorized representatives.
>
> Any individual grievance involving a disciplinary penalty (including a discharge) imposed during the term of this Agreement upon an employee having more than one year of continuous service may be submitted to arbitration by either party if it remains unsettled after having been properly and fully processed in accordance with the provisions of Article III. (70-71, 86)

Since then, notwithstanding proposals by the Union to modify the clause, the arbitration provisions have remained the same.

In negotiations in 1969, 1972, and 1973 the Union sought to broaden the scope of the arbitration clause, but was unsuccessful. (71, 87-90) The 1969 proposal is illustrative. There, the Union sought to modify the arbitration clause to provide:

> Arbitration: Any grievance which has been processed through the Negotiating Procedure provided for in Article III of the Contract involving the interpretation or application of this Agreement may be submitted to arbitration by either party.

Similarly, in 1972, the Union proposed that the parties:

> allow for arbitration of grievances for seniority, decreasing forces, increasing forces, continuity of service, subcontracting and loss of pay the same as for disciplinary action. (Emphasis added) (71, 89)

Ultimately, it chose to abandon the attempt to secure these changes.

The Union now makes the extraordinarily weak argument that its past contract proposals were "superfluous" and begs this Court not to consider them. The Union cannot so easily escape the true meaning of the arbitration clause which both parties acknowledged through their words and actions.

2. The Limited No-Strike Clause and the History of Contract Administration

The presence of a limited no-strike clause in the agreement and the history of the parties' use of the grievance machinery further confirm the fact that neither party regarded arbitration of non-disciplinary grievances to be mandatory. The no-strike clause in the labor agreement (Article XXI) does not contain a broad no-strike commitment which would warrant the District Court's inference that the arbitration clause was also broad. Rather, the no-strike clause is divided into two parts which parallel the two parts of the arbitration procedures: It provides:

> There shall be no strike, sitdown, slowdown, employee demonstration or any other organized or concerted interference with work of any kind in connection with any matter subject to the grievance procedure, and no such interference with work shall be directly or indirectly authorized or sanctioned by the Association or its respective officers or representatives, unless and until all of the respective provisions of the successive steps of the grievance procedure set forth in Article III shall have been complied with by the Association or if the matter is submitted to arbitration as provided in Article IV.
>
> In addition the Association will be required to give the Manager-Area Union Relations written or telegraphic notice not less than twenty-four (24) hours prior to the commencement of any such strike or work stoppage. The notice shall specify the date and time the strike or work stoppage is to commence, the grievance over which such strike is being called and the bargaining unit that will be involved in such strike. (Emphasis added) (41-42)

If the arbitration procedures are construed to be mandatory with respect to all grievances, the explicit provision for strikes over matters not submitted to arbitration would be rendered meaningless. Since a no-strike clause is deemed the quid pro quo of a mandatory arbitration clause, the express provision for strikes over unresolved grievances compels the conclusion that not all grievances are subject to mandatory arbitration.

In all prior instances where the Union sought arbitration of grievances under the arbitration clause as it is now worded, the Union recognized that mutual agreement of the parties was a prerequisite to arbitration. (73)

In recognition of this interpretation, the Union called a work stoppage with respect to an unresolved grievance in 1971 without first seeking to have the grievance submitted to arbitration. The Union strike notice, which illustrated the relationship between the non-mandatory arbitration clause and the lack of a no-strike commitment with respect to unresolved grievances, stated:

> We hereby notify you, pursuant to Article XXI of the current GE-SDA Agreement, that there will be a work stoppage commencing at 12:01 AM on August 26, 1971.
>
> The grievance over which this work stoppage is being called is SDA Grievance #71-3. The grievance concerned the problem of non-bargaining unit people doing bargaining unit work. This

> grievance remains unresolved after being processed thru the steps of the grievance procedure set forth in Article III of the Agreement. The work stoppage will involve all employees covered by the SDA bargaining unit. (91)

After exhausting the three steps of the grievance procedure, the Union gave the Company notice of its intention to strike without ever attempting to seek arbitration and then did, in fact, strike over the grievance. (72-73)

B. District Court Error

The Court misconstrued the meaning and effect of the limited no-strike clause. In its Memorandum-Decision and Order, the court stated:

> Article XXI -- Strikes and Lockouts -- is the so-called quid pro quo clause of the Agreement which strongly implies that binding grievance and arbitration procedures as provided by Articles III and IV are required and must be resorted to before engaging in the economic warfare of a strike or lockout. (100)

This statement overlooks the obvious fact that the no-strike clause does not prohibit strikes over non-disciplinary grievances which remain unresolved after processing through the three steps of the grievance procedure.

The District Court erred in another, more significant respect. The Company asserts that the arbitration clause unambiguously provides for non-mandatory arbitration of non-disciplinary grievances. However, the Court found ambiguity

in the arbitration clause.* Assuming arguendo that the clause is ambiguous, the District Court, as the analysis in its opinion makes clear, did not consider proffered evidence of the Company concerning bargaining history, past contract administration or sworn party admissions which would have resolved any such ambiguity. (98) The failure of the Court to consider such evidence constitutes a further basis for reversal. Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 61 LRRM 2001, 2003 (2nd Cir. 1965).

In Strauss, this Court was confronted with the same problem of having to ascertain whether the contract language supported the Company's contention that the parties intended to exclude the dispute in question from the scope of the arbitration clause. This Court elaborated on the proper scope of the District Court's duty in this regard:

*It is respectfully submitted that the ambiguity which troubled the District Court was due to lapses in its own analysis. For example, the Court based its opinion in part on the unpersuasiveness of the Company's "claim that 'may" indicated a permissive arbitration clause." (98-99) In point of fact, the Company never asserted such a claim. Of course, the term "may" is consistent with the position that the arbitration clause is permissive. But it would have made no difference had the parties used "must" instead of "may" in view of the clear expression of their intent several lines later that arbitration over non-disciplinary grievances may be had only "with prior written mutual agreement of the parties." By dwelling on a distinction in terminology which had no real bearing on the resolution of the problem, the District Court reached a conclusion directly contrary to the plain meaning of language which was controlling.

> "But the mere fact that neither of two proffered interpretations of an exclusionary clause, one of which would permit arbitration, the other of which would prevent it, is frivolous or unreasonable on its face, does not mean, as the trial court apparently believed, that the court must order the parties to proceed to arbitration. We believe that the trial court should have accepted proffered proof relevant to the intentions of the parties at the time they drafted their agreement. The duty to arbitrate being contractual in origin, the Court must make an effort to construe the extent of that contractual duty, rather than force arbitration even of arbitrability upon parties who did not bind themselves to such a submission. Further inquiry may well enable the trial court to say with "positive assurance" that the exclusionary clause covers this dispute, so that the request for an order compelling arbitration should be denied. On the other hand, further inquiry may also indicate that the trial court cannot positively declare that the parties intended to exclude the dispute from arbitration -- in which case, the trial court must issue an order directing the parties to proceed to arbitration." 353 F. 2d at 557, 61 LRRM at 2003.

The Court was aware of the danger of courts becoming "entangled in the construction of the substantive provisions of a labor agreement through the back door of interpreting the arbitration clause". Strauss v. Silvercup Bakers, Inc., supra, 353 F. 2d at 557, 61 LRRM at 2003, citing United Steelworkers of America v. Warrior & Gulf Navigation Co., supra, 363 U.S. at 74 46 LRRM 2420. It acknowledged that inquiries into bargaining history may be refused if a court would be drawn into the merits of the

dispute. District 50, United Mine Workers of America v. Bridgeport Gas Co., 328 F. 2d 381, 55 LRRM 2463 (2nd Cir. 1964). But in Strauss, as in the present case, the inquiry was connected directly with the extent of the duty to arbitrate and did not touch upon the merits of the dispute. Since the threshold question of substantive arbitrability is for the court, not the arbitrator, reliance upon such evidence does not encroach upon the arbitrator's function. Strauss v. Silvercup Bakers, Inc., supra; Independent Petroleum Workers of America v. American Oil Co., 324 F. 2d 903, 54 LRRM 2598 (7th Cir. 1963), aff'd by equally divided court, 379 U.S. 130, 85 S. Ct. 271, 57 LRRM 2512 (1964); IAM v. General Electric Co., 282 F. Supp. 413, 67 LRRM 2817 (N.D.N.Y. 1968), aff'd. 406 F. 2d 1046, 70 LRRM 2477 (2nd Cir. 1969).

In short, when an arbitration clause is ambiguous and bargaining history or other evidence relevant to the parties' intention is available to resolve the ambiguity, a court errs if it does not inquire fully into the proffered evidence. It is simply not in a position to state "with positive assurance" that a matter was not intended to be arbitrable until it has done so. Accord, Local 81 v. Western Electric Co., 508 F.2d 106, 88 LRRM 2081 (7th Cir.

1974) (Court erred by entering summary judgment directing arbitration without first having examined bargaining history is connection with substantive arbitrability issue); Pacific Northwest Bell Telephone Co. v. Communication Workers, 310 F.2d 244, 51 LRRM 2405 (9th Cir. 1962), aff'd. after remand, 337 F.2d 455 (1964).

POINT III

THE DISTRICT COURT ERRED BY IMPROPERLY DEFERRING THE ISSUE OF SUBSTANTIVE ARBITRABILITY.

The issuance of a court order compelling arbitration does not necessarily mean that the court determined the question of substantive arbitrability. We have assumed for the purposes of this memorandum of law that the court attempted to decide the question of substantive arbitrability but did so improperly. However, the court may not have discharged even this responsibility.

The District Court was confronted with the question whether Article IV of the bargaining agreement provided mandatory or permissive arbitration with respect to non-disciplinary matters. It recognized ambiguity in the arbitration provision stating in its Memorandum-Decision and Order:

> "In terms of the literal requirement of written authorization of Article IV which calls for arbitration, undoubtedly it can be read in different ways -- both as mandatory and permissive....
>
> Its true meaning, as I stated in the previous decision, is penultimately for the arbitrator and only thereafter for a federal court....The inherent difficulty which a federal court has in deciding questions of arbitrability explains in no small measure the reasons behind the strong federal policy to leave to the industry itself the task of settling its labor disputes, especially when the controversy has its roots in the language of the contract as here." (100-101)

It is fundamental that the threshold question whether the parties have agreed, by contract, to arbitrate a dispute is for the court to decide. Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491, 92 S.Ct. 1710, 1713, 80 LRRM 2441, 2442 (1972); John Wiley & Sons v. Livingston, 376 U.S. 543, 547, 84 S.Ct. 909, 913, 55 LRRM 2769, 2771 (1964); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 50 LRRM 2433, 2435 (1962); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583, 80 S.Ct. 1347, 1353, 46 LRRM 2416, 2420 (1960). As the Supreme Court phrased it:

> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. John Wiley & Sons v. Livingston, supra, 376 U.S. at 547, 84 S. Ct. at 913, 55 LRRM at 2771 (1964).

By referring to an arbitrator the question whether the arbitration clause provided for mandatory or permissive arbitration, the District Court committed clear reversible error.

CONCLUSION

The order of the District Court runs directly contrary to the clearly expressed intent of the parties by forcing them to arbitrate a dispute which they had agreed would be subject to arbitration only by mutual consent. In making its determination, the District Court ignored evidence of sworn admissions by the Union in pleadings related to this action and also ignored parties' bargaining history and past practices. This evidence confirms conclusively the mutual understanding of the parties that non-disciplinary grievances are not subject to mandatory arbitration. The District Court compounded its error in referring the question of substantive arbitrability to the arbitrator, contrary to repeated decisions by the Supreme Court that this issue is for the court to decide in the first instance. Accordingly, the decision of the District Court should be reversed.

Dated: November 13, 1975

Respectfully submitted,

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Re: **THOMAS C. GANGEMI, as President of the SYRACUSE DRAFTMEN'S ASSOCIATION**

v.

GENERAL ELECTRIC CO.

State of New York)
County of Onondaga) ss.:
City of Syracuse)

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Attorney(s) for **Appellant,**

XX he personally served ☐ Record ☒ Brief and ☐ Appendix of the above entitled case addressed to:

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